

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

In the Matter of	)	MB Docket No. 08-214
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7709-P
Complainant	)	
v.	)	
Time Warner Cable Inc.	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7822-P
Complainant	)	
v.	)	
Bright House Networks, LLC,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7829-P
Complainant	)	
v.	)	
Cox Communications, Inc.,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7907-P
Complainant	)	
v.	)	
Comcast Corporation,	)	
Defendant	)	
	)	

To: Marlene H. Dortch, Secretary, Federal Communications Commission  
Attn: The Hon. Richard L. Sippel – Chief Administrative Law Judge

March 2, 2009

**DEFENDANTS' SECOND MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS**

Pursuant to 47 C.F.R. § 1.325, defendants Cox Communications, Inc. (“Cox”), Time Warner Cable Inc. (“TWC”), Comcast Corporation, and Bright House Networks, LLC (collectively, the “Defendants”), hereby move to compel Complainant Herring Broadcasting, Inc.

d/b/a WealthTV (“WealthTV”) to produce certain documents in response to the Defendants’ respective December 5, 2008 Requests for Production of Documents.<sup>1</sup>

### **PRELIMINARY STATEMENT**

When it became clear three weeks ago that WealthTV would refuse to produce critical documents – its affiliation agreements (except the two it selected unilaterally) and documents relating to other MVPDs who declined to carry WealthTV – Defendants immediately moved to compel those documents to expedite the hearing process. Defendants did not await WealthTV’s actual production of documents to raise that fundamental issue. That motion, filed on February 9, 2009, remains pending and is ripe for decision. We do not reargue that motion here.

Now that Wealth TV has made its production, however, it has become plain that Wealth TV has misinterpreted certain requests, refusing to provide highly relevant information (e.g., its own subscriber numbers), and there are categories of documents that appear to be missing from the production. Defendants were very selective in their Requests, which were limited to ten, to seek only those documents that were relevant to WealthTV’s theories and to our defense of the case. Accordingly, while Defendants will continue to try to resolve these issues, we move to compel to ensure the documents are produced quickly enough to be used in the hearing.

### **DOCUMENT REQUESTS**

#### **WealthTV Has Not Produced Documents Relating to WealthTV’s Business, Strategic or Financial Plans; Subscriber Numbers; Comparisons With Other Networks; and Reports of Contacts With Systems.**

On December 5, 2008, Defendants each served ten document requests on WealthTV. For ease of reference, we refer mainly to the Cox Document Requests, but each Defendant sought documents similar to those addressed in this motion.

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<sup>1</sup> In all material respects, the disputes between each Defendant and WealthTV are the same, and each Defendant incorporates and adopts the arguments set forth herein.

1. Documents Relating to WealthTV's Subscriber Numbers. We understand that WealthTV has subscriber numbers that they have compiled over time, but WealthTV has refused to produce them. Other than WealthTV's affiliation agreements and related documents and documents from unaffiliated MVPDs that declined carriage of WealthTV, it is hard to imagine documents more relevant than those reflecting WealthTV's actual subscriber numbers over time. WealthTV claims the Defendants' conduct thwarted its ability to compete fairly and obtain subscribers, that WealthTV could not build the critical mass of subscribers it needed to become and remain viable, and that its network has "proven consumer appeal." How could WealthTV's own subscriber numbers not be directly relevant to these issues?

There is no question that documents relating to subscriber numbers were requested in several different Document Requests. Cox's Request 8 plainly covers documents reflecting subscriber numbers because it seeks documents showing the "alleged effects of Cox's conduct" on WealthTV.<sup>2</sup> WealthTV claims that it was unable to build its subscriber base because of Cox's conduct. How can WealthTV then refuse to provide documents that reflect its subscriber numbers? Defendants need the documents showing the growth (or lack of growth) of WealthTV's subscribers over time to see what, if any, effect their conduct allegedly had on Wealth TV's ability to grow.

Cox's Request 9 also seeks documents relating to the alleged popularity of WealthTV and its alleged "proven consumer appeal."<sup>3</sup> There are no available ratings and few other

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<sup>2</sup> See, e.g., Cox Document Request 8 ("Produce all Documents relating to the alleged effects of Cox's conduct in restraining the ability of WealthTV to compete fairly, including but not limited to Documents relating to the number of subscribers WealthTV needs to become a viable business, Documents relating to whether WealthTV can be financially successful in the long term without carriage by either TWC or Comcast or both, and Documents relating to any damages or harm WealthTV claims to have suffered as a result of Cox's alleged conduct.").

<sup>3</sup> See e.g., Cox Document Request 9 ("Produce all Documents relating to the popularity, appeal or quality of WealthTV's programming network, including but not limited to Documents related to WealthTV's public statements that it would become profitable by 2009, WealthTV's

measures of WealthTV's alleged popularity or consumer appeal. Cox's Request 9 also asked for documents relating to communications with advertisers, which also relates to whether WealthTV was viable, or "appealing," and also to remedy in this case. Surely, Wealth TV regularly communicated its subscriber numbers to advertisers, and received responses, yet almost no such documents have been produced.<sup>4</sup>

Moreover, although Defendants have requested (and moved to compel) a representative sampling of WealthTV's affiliation agreements, WealthTV has agreed to produce only *two*, which WealthTV has self-selected. WealthTV will not even provide a list of the others, even though it boasts that it has more than 75 such agreements to suggest its own popularity and allegedly broad consumer appeal. Without the actual agreements, however, Defendants cannot ascertain if they are broad carriage agreements representing many subscribers or hunting licenses with very few actual subscribers to the WealthTV network. Documents reflecting subscriber numbers are critical for this purpose as well.

Cox's Request 4 also sought documents containing subscriber numbers, seeking WealthTV's business, strategic, and financial plans as well as financial statements.<sup>5</sup> Surely, WealthTV's subscriber numbers figure prominently in its business, strategic, and financial plans

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claim that it has "proven customer appeal," and communications to or from advertisers or potential advertisers relating to the sale or potential sale of advertising time on WealthTV."). *See also* Time Warner Cable Document Request 4 (similar).

<sup>4</sup> The only documents WealthTV has produced that appear to have been presented to potential advertisers were nearly four years old. *See, e.g.*, WTV 001 0004649-51.

<sup>5</sup> *See, e.g.*, Cox Document Request 4 ("Produce all documents relating to WealthTV's business, strategic, or financial plans for Wealth TV, including but not limited to any pre- or post-launch market research regarding demand for HD programming generally and Wealth TV programming specifically, plans for ongoing investment in Wealth TV, business justifications for WealthTV's investment in an HD programming studio, targets and projections for subscribers, revenues and expenses, and any other financial projections, business plans, financial statements, profit and loss statements, and income statements relating to WealthTV."). *See also* Time Warner Cable Document Request 8 (similar).

as well as in its financial statements. How could the growth, lack of growth, or even just reported numbers of subscribers not relate to such plans?

WealthTV did not object to these requests - or to producing documents relating to subscriber numbers – when it served its objections on December 16, 2008. In fact, Defendants did not know that WealthTV planned not to produce such documents until the production actually occurred on February 20, 2009, and Defendants had reviewed the production.

2. Documents Relating to WealthTV's Business, Strategic or Financial Plans.

WealthTV has not objected to the production of its business, strategic, and financial plans and financial statements.<sup>6</sup> Yet WealthTV has produced only a single financial projection, document WTV 001 000050-52, which is a projection only for 2009. One would expect a business that has been operating since 2004 to have prepared business plans every year, whether they called them business plans, strategic plans, financial plans or projections or whatever else they might have labeled them. WealthTV's production includes no such plans, no financial statements, profit and loss statements or any similar documents. It is difficult to believe that a business the size of WealthTV does not even track its revenues, expenses, subscribers, assets, or cash flow.

3. Documents Relating to WealthTV's Network Comparisons. WealthTV has not objected to the production of documents relating to comparisons of its network with MOJO<sup>7</sup> or comparisons of its network with its other networks,<sup>8</sup> but has produced very little in response. While WealthTV's counsel has informed defense counsel that these documents have been produced, it is important to ensure that a thorough search has been conducted under the circumstances. Accordingly, we ask WealthTV's counsel to confirm that they have conducted a

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<sup>6</sup> See Cox Document Request 4.

<sup>7</sup> See Cox Document Request 6.

<sup>8</sup> See Cox Document Request 7.

good faith search and produced all non-privileged responsive documents. In the absence of this assurance, we respectfully request the entry of an order to compel such production.

4. Documents Relating to Contacts With Defendants' Systems. WealthTV has not objected to the production of documents relating to contacts with Defendants' systems, but it has produced very few documents in this category while at the same time purporting to identify hundreds of alleged contacts with systems. While WealthTV's counsel has informed defense counsel that these documents have been produced, it is important to ensure that a thorough search has been conducted under the circumstances. Accordingly, we ask WealthTV's counsel to confirm that they have conducted a good faith search and produced all non-privileged responsive documents. In the absence of this assurance, we respectfully request the entry of an order to compel such production.

5. Declaration To Explain Loss of Electronic Documents. Finally, counsel for WealthTV has informed defense counsel that WealthTV experienced a computer crash sometime between 2001 and 2006 that resulted in a loss of documents. Therefore, even with regard to Document Requests for which WealthTV has represented that it has produced responsive documents, Defendants do not know whether additional responsive documents might have existed (and during what period) but have been destroyed. In Defendants' document requests, WealthTV was instructed to provide relevant information to enable Defendants to assess claims of document destruction,<sup>9</sup> but no such information has been provided. Accordingly, Defendants request that WealthTV be ordered to provide a client declaration explaining the circumstances of the computer incident, when it occurred, which computers were affected, what documents were lost, during what period of time, what was done to retrieve data, and any other pertinent details.

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<sup>9</sup> See, e.g., Cox Document Requests, Instruction 8.

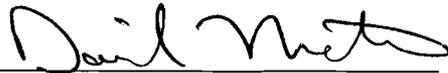
Between Friday February 27, 2009 and today, counsel for Cox has discussed these issues with counsel for WealthTV, who has indicated a willingness to consider providing additional documents and information responsive to these requests, if available. Because the deadline for filing motions to compel is today, however, Defendants submit this motion to compel discovery of these critical documents and information.

### CONCLUSION

For the foregoing reasons, Defendants respectfully request that WealthTV be ordered to produce documents relating to its subscriber numbers; documents relating to its business, strategic, and financial plans, and its financial statements; documents relating to comparisons of its network with MOJO or with other networks; and documents relating to contacts with Defendants' systems.

Respectfully submitted,

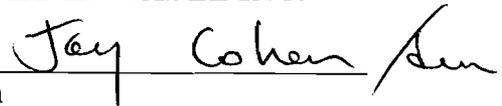
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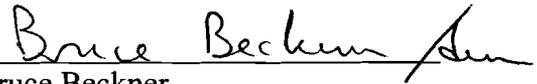
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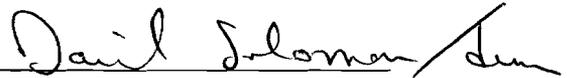
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Dated: March 2, 2009

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

<b>In the Matter of</b>	)	
	)	<b>MB Docket No. 08-214</b>
<b>Herring Broadcasting, Inc.</b>	)	
<b>Complainant</b>	)	<b>CSR-7829-P</b>
	)	
<b>v.</b>	)	
	)	
<b>Cox Communications, Inc.</b>	)	
<b>Defendant</b>	)	

**COX’S REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to the Order of Chief Administrative Law Judge Richard L. Sippel dated December 1, 2008, and Sections 1.311(b) and 1.325 of the Rules of the Federal Communications Commission, 47 C.F.R. §§ 1.311(b), 1.325, Defendant Cox Communications, Inc., hereby requests that Complainant Herring Broadcasting, Inc. d/b/a Wealth TV (“Wealth TV”) produce for inspection and copying the following documents at the offices of Dow Lohnes PLLC, 1200 New Hampshire Ave., N.W., Suite 800, Washington, D.C. 20036, on or before December 31, 2008.

**DEFINITIONS**

1. The terms “Wealth TV,” “you,” and “your” mean and includes Complainant Herring Broadcasting, Inc., and its current and former directors, officers, principals, partners, employees, agents, parents, subsidiaries, predecessors, successors, assigns, and/or anyone acting or purporting to act on behalf of any of the foregoing. All entities described herein shall be deemed representatives of Wealth TV for the purpose of responding to the foregoing requests.

2. “Cox” means and includes Cox Communications, Inc. and its directors, officers, principals, partners, employees, agents, parents, subsidiaries, predecessors, successors, and/or anyone acting or purporting to act on behalf of any of the foregoing.

3. “MOJO” means the high definition video channel of the same name and formerly known as INHD.

4. The terms “Document” and “Documents” are used in their customary and broad sense and include, but are not limited to, the original and any draft or copy, regardless of origin, author, location or medium, of any document, including any printed, written, graphic, mechanical, electronic, or magnetic record or recording of any information of any kind, including, but not limited to, any electronic mail, computer data files, computer disc, other computer-generated or electronically stored information, note or posting or any other display on the Internet or World Wide Web, agreement, book, letter, memorandum, study, analysis, survey, correspondence, contract, map, sketch, graph, drawing, schematic diagram, telegram, report, photograph, pamphlet, note, message (including any report, note, or memorandum of any telephone conversation or conference), calendar or diary entry, minutes of any meeting, record of an oral conversation, audio or video tape recording, invoice, account, check, receipt, notebook, ledger, press release, circular, working paper, microfilm, or microfiche, regardless of whether designated “confidential,” “privileged,” or otherwise.

5. The terms “communication” or “communications” mean the recording, transmitting, giving, receiving, or exchanging of information or data of any kind by any means whatsoever.

6. The terms “person” or “persons” means and includes all natural persons and entities, including without limitation, all business, legal, and/or governmental entities or associations.

7. The terms “referring to,” “relating to,” “reflecting,” “concerning,” or any conjugation of any of these shall be interpreted in their broadest possible sense and at a minimum shall mean: relevant to, referring to, about, alluding to, analyzing, being, commenting on, concerning, pertaining to, constituting, evidencing, identifying, stating, describing, discussing, in connection with, in respect of, dealing with, mentioning, reflecting, regarding, responding to, showing, embodying, or supporting.

8. The term “possession, custody or control” includes individual, joint, or several possession, custody or control, not only by Wealth TV or persons answering this discovery request on behalf of Wealth TV, but also individual, joint, or several possession, custody or control by any other person acting or purporting to act on behalf of Wealth TV, whether as an agent, as an employee, as a consultant, as an accountant, as an attorney, or in any other capacity.

9. The term MVPD includes, but is not limited to “Multichannel Video Programming Distributors,” as defined by Section 76.1000(e) of the Rules of the Federal Communications Commission. 47 C.F.R. § 76.1000(e). For purposes of responding to these requests, the term MVPD also includes broadcasters engaged in distributing multiple digital broadcast programming streams on a single digital channel.

10. “DirecTV” means The DirecTV Group, Inc., including all employees and representatives of any kind (in their individual or representative capacities).

11. “DISH Network” means DISH Network Corporation, including all employees and representatives of any kind (in their individual or representative capacities).

12. The term “cable operator” shall have the meaning set forth in 47 U.S.C. § 522(5).
13. The term “cable system” shall have the meaning set forth in 47 U.S.C. § 522(7).
14. The term “Relevant Period” means including and subsequent to January 1, 2002.

### INSTRUCTIONS

1. Each of the following document requests seeks Documents in your possession, custody, or control regardless of the location of such Documents.
2. Use of the singular form of any word includes the plural and vice versa. Use of a masculine, feminine, or neutral pronoun includes all genders appropriate to the context. The past tense includes the present tense and vice versa where the clear meaning is not distorted by change of tense.
3. “And” as well as “or” shall be construed disjunctively or conjunctively as necessary to bring within the scope of these document requests any information that might otherwise be construed to be outside the scope.
4. The term “all” shall be construed to include “any” and “each,” “any” shall be construed to include “all” and “each,” and “each” shall be construed to include “all” and “any,” in each case as is necessary to bring within the scope of these requests Documents that might otherwise be construed as outside their scope.
5. Each Document furnished in response to the requests for production is to be produced as it is kept in the normal course of business or shall be organized and labeled to correspond with each paragraph in the request for production. All Documents that are physically attached to each other when located for production shall be left so attached. Documents that are segregated or separated from other Documents, whether by use of binders, files, subfiles, or by dividers, tabs, or any other method, shall be left so segregated or separated. All labels or other

forms of identification contained, placed, attached, or appended on or to any binders, files, subfiles, dividers, or tabs shall be produced. The Documents produced shall be Bates-numbered sequentially.

6. Each Document is to be produced (along with all drafts thereof) in its entirety, without abbreviation, expurgation, or redaction. In the event that a copy of a Document, the production of which is requested, is not identical to any other copy thereof, by reason of any alterations, marginal notes, comments, or material contained therein or attached thereto, or otherwise, all such non-identical copies shall be produced separately.

7. If any Documents covered by the request for production are withheld under a claim of privilege, furnish a list describing each Document for which privilege is claimed, together with the following information:

- a. author of the Document;
- b. name and job title of each recipient and person to whom a copy was furnished;
- c. the relationship of the author to each addressee;
- d. date of the Document;
- e. the nature of the privilege being asserted;
- f. the paragraph of the requests for production to which each such Document is responsive; and
- g. a brief description of the Document sufficient to allow Cox to assess the applicability of the claimed privilege or protection, without disclosing the privileged information, including the type of Document and the general subject matter of the Document.

8. If any requested Document has been destroyed, transferred, discarded, or is otherwise no longer in existence, please state:

- a. author of the Document;

- b. date of the Document;
- c. subject matter of the Document;
- d. the date it was destroyed, transferred, discarded or discovered no longer to be in existence;
- e. the manner of its destruction (e.g. shredded or deleted) or transfer;
- f. the person who destroyed or transferred the Document; and
- g. the reason it was destroyed, transferred, discarded or is no longer in existence.

9. In each instance where you produce a Document in response to a discovery request, produce the Document in its entirety, including all attachments, transmittal sheets, cover letters, exhibits, and enclosures without abbreviation or expurgation. In the event that WealthTV is able to provide only part of the Documents called for by any particular document request, WealthTV shall provide all of the information it is able to provide and state the reason for its inability to provide the remainder.

10. In the event that more than one copy of a Document exists, a copy of the original shall be produced, as well as every copy containing any notations or markings of any sort not apparent on the original. Any Document kept in files in the ordinary course of business shall be produced in a manner that preserves and indicates the files from which, and the person from whose files, the Documents were taken.

11. Any electronically stored information that is to be produced electronically should be produced in Summation DII Load Files with accompanying Optical Character Recognition in a manner that preserves and indicates the files from which, and the person from whose files, such electronically stored information was taken. All electronically stored information produced shall continue to be preserved and maintained as it is kept in the normal course of business, with all

associated metadata preserved as well. Any responsive video material should be produced on digital video discs or comparable media in high definition format. Any responsive recordings should be produced on compact discs or comparable media.

12. If, in responding to this document request, or any part of it, you encounter any ambiguity in construing either the document request or a definition or instruction relevant to the inquiry contained within the document request, describe the purported ambiguity and construe the request in the broadest manner reasonably calculated to lead to information relevant to any issues or potential issues in the case. No claim of ambiguity may be utilized by Wealth TV as a basis for refusing to produce Documents responsive to any request.

13. Unless otherwise specified, each document request seeks Documents that were created or existed during the Relevant Period that is described above.

14. These document requests are continuing so as to require additional or amended responses or productions promptly if new or further information or Documents are obtained or discovered subsequent to the time responses are served or Documents produced.

15. If no Documents exist that are responsive to a particular paragraph of these requests, so state in writing.

16. No request shall be read to limit any other request.

17. All requests herein are subject to the entry of a mutually agreeable protective order.

### **REQUESTS**

1. Produce all Documents relating to any communications between WealthTV and Cox, including but not limited to Documents relating to any communications to or from Cox personnel, employees or agents, any marketing materials, presentations, pitches, or other

communications with Cox personnel, employees, or agents and any other Documents provided to or received from any Cox representative.

2. Produce all Documents relating to WealthTV's strategies, plans, or efforts to seek carriage on any one or all of Cox's cable television systems.

3. Produce all Documents relating to proposed or actual carriage of Wealth TV by DirecTV, Dish Network or any other MVPDs, including but not limited to Documents relating to any communications concerning such actual or proposed carriage, Documents relating to proposed, draft or executed affiliate agreements, including but not limited to the terms and conditions of actual carriage, Documents relating to negotiations of any agreements or proposed agreements regarding carriage, Documents relating to any rejection of proposed carriage, and Documents relating to internal communications or analysis of such carriage or proposed carriage or rejection of carriage.

4. Produce all documents relating to WealthTV's business, strategic, or financial plans for Wealth TV, including but not limited to any pre- or post-launch market research regarding demand for HD programming generally and Wealth TV programming specifically, plans for ongoing investment in Wealth TV, business justifications for WealthTV's investment in an HD programming studio, targets and projections for subscribers, revenues and expenses, and any other financial projections, business plans, financial statements, profit and loss statements, and income statements relating to WealthTV.

5. Produce all Documents relating to your contention that Cox has engaged in a pattern and practice of discrimination against non-affiliated networks.

6. Produce all Documents relating to your contention that WealthTV is substantially similar to MOJO, including but not limited to Documents relating to alleged similarities in the

programming, target demographics, advertising markets or any other aspects of WealthTV and MOJO.

7. Produce all Documents relating to similarities or differences between Wealth TV and any other programming network or networks (e.g., The Fine Living Network, HGTV, INHD), including but not limited to Documents relating to similarities or potential similarities in the programming, target demographics or advertising markets of WealthTV and any other programming network or networks.

8. Produce all Documents relating to the alleged effects of Cox's conduct in restraining the ability of WealthTV to compete fairly, including but not limited to Documents relating to the number of subscribers WealthTV needs to become a viable business, Documents relating to whether WealthTV can be financially successful in the long term without carriage by either TWC or Comcast or both, and Documents relating to any damages or harm WealthTV claims to have suffered as a result of Cox's alleged conduct.

9. Produce all Documents relating to the popularity, appeal or quality of WealthTV's programming network, including but not limited to Documents related to WealthTV's public statements that it would become profitable by 2009, WealthTV's claim that it has "proven consumer appeal," and communications to or from advertisers or potential advertisers relating to the sale or potential sale of advertising time on Wealth TV.

10. Produce all Documents relating to any affidavit, declaration, summary, opinion, or other disclosure or testimony submitted or to be submitted in this proceeding by any expert retained by WealthTV, including but not limited to any Documents considered or relied upon by

any such expert in the course of preparing any such affidavit, declaration, summary, opinion, testimony or other disclosure.

Dated: December 5, 2008

Respectfully Submitted,

**COX COMMUNICATIONS, INC.**

A handwritten signature in black ink, appearing to read "David E. Mills", written over a horizontal line.

David E. Mills

Jason E. Rademacher

Dow Lohnes PLLC

1200 New Hampshire Ave., N.W., Suite 800

Washington, DC 20036-6802

Its Attorneys

**CERTIFICATE OF SERVICE**

I, J. Parker Erkmann, hereby certify that copies of the foregoing “Defendants’ Second Motion to Compel Production of Documents” were served this 2nd day of March, 2009, via email upon the following:

The Honorable Richard L. Sippel  
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